Norton Healthcare, Inc., d/b/a Norton Audubon Hospital *and* Nurses Professional Organization, affiliated with the United Nurses of America, American Federation of State, County, and Municipal Employees, AFL–CIO. Cases 9–CA–37404 and 9–CA–37933

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On October 31, 2001, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order[2] as modified below.

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(1) by coercively interrogating employee Maryann King about her union sentiments and those of other employees.

The facts, in brief, are as follows. Since 1999, King had been employed by Respondent as a registered nurse (RN), under the supervision of Nurse Manager Kim Blair. As an open union supporter, King regularly wore union insignia at work.

In August 2000, King was in Blair's office for her performance evaluation. Following the evaluation, Blair stated that she had noticed that King was wearing a union button and she guessed that meant Blair supported the Union. King responded affirmatively. Blair next asked if King was unhappy with her job. When King replied that she loved her job, Blair then probed King for the reason for the button. King answered that the nurses had several issues. Not letting the matter drop, Blair pressed King to specify the issues with which the Union could help. King mentioned both the mandating of work[3] and a pension plan. In response, Blair queried whether King believed the Union would be able to help with the mandating of work "if there's nobody to put in the job." Blair also asked King what she knew about the level of union support among the other employees. Blair indicated that she had observed several employees wearing union buttons, and she asked King if the Union had enough votes, at that time, to win an election. Although King testified that she did not feel threatened or intimidated by Blair's questions, she subsequently stopped wearing her union button, as a result of the controversy it caused.

Under Board law, it is well established that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."[4] In making that determination, the Board considers

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's finding that, between August 11, 1999, and mid-September 2000, the Respondent unlawfully refused to employ Wilma McCombs in a certified nursing assistant type position, Member Bartlett does not rely on the Respondent's general statements expressing its opposition to the Union as evidence of animus. He recognizes that Board precedent, which by practice remains controlling absent a three-Member Board majority to overrule it, permits reliance on such statements as evidence of animus. However, in agreement with several circuit courts of appeals, he would find that Sec. 8(c) of the Act prohibits the Board from relying on such lawful statements as evidence of either an unfair labor practice or animus. See, e.g., *NLRB v. Lampi*, 240 F.3d 931, 936 (11th Cir. 2001); *Carry Cos. of Illinois v. NLRB*, 30 F.3d 922, 927 (7th Cir. 1994). See also *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 676 (D.C. Cir. 2001) (Henderson, J., writing separately) (listing additional cases). Nor does Member Bartlett rely on the unfair labor practices of the Respondent's predecessor as evidence of the Respondent's union animus. Member Cowen agrees with Member Bartlett in both respects. See his partial dissent and partial concurrence at fn. 3.

In finding antiunion animus, Member Liebman finds it unnecessary to rely on the unfair labor practices of the Respondent's predecessor. Further, Member Liebman finds it unnecessary to rely on the Respondent's statements opposing the Union in finding antiunion animus, but she observes that, as a general matter, such statements may properly be considered as background evidence of animus. See, e.g., *Tim Foley Plumbing*, 337 NLRB 328, 329 fn. 5 (2002), and cases cited therein.

[2] We have modified the judge's recommended Order to omit a requirement that the Respondent offer McCombs a 1.0 (full-time) patient support associate position (also referred to as patient care associate (PCA) position) or, if one does not exist, a substantially equivalent position. It is undisputed that the Respondent offered McCombs a 1.0 PCA position on September 15, 2000, an issue that was fully litigated at the hearing in this case. Cf. *Transportes Hispanos, Inc.*, 332 NLRB 1266, 1266 fn. 2 (2000) (adopting the judge's recommendation that Respondent offer instatement to discriminatees only to extend it had not already done so). Member Cowen agrees with this aspect of the decision. See his partial dissent and partial concurrence at fn. 1. Member Liebman concurs. She observes that the General Counsel, in asserting that the effect of the reinstatement offer should be decided in the compliance proceeding, has not argued that the offer was invalid in any respect. Cf. *Krist Oil Co.*, 328 NLRB 825, 827–830 (1999) (discussing circumstances, such as Respondent's bad faith, in which facially valid reinstatement offer will not toll backpay).

We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] Although the phrase "mandating of work" is not defined in the record, the Charging Party's posthearing brief indicates that it is mandated overtime.

[4] *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter.[5]

We agree with the judge that, under the totality of the circumstances test set forth in *Rossmore House*, supra, Blair's questioning of King was coercive. Although King was an open union supporter, as the judge observed Blair's questioning of King took place in Blair's office after discussion of King's performance evaluation; King was not advised of any legitimate reason for the questioning; and she was given no assurances that she need not answer the questions or that she would not be subject to retaliation as a result of her answers.[6] That the interrogation occurred immediately following King's performance evaluation added to its potential coercive effect, because the circumstances reasonably suggested that King's future evaluations might be adversely affected by continuing support for the Union.[7] Further, the interrogation occurred against a background of other unfair labor practices committed by the Respondent in its effort to avoid unionization. In addition to the other unfair labor practices in this case, in the 1998–1999 period preceding the events at issue, the Respondent, among other things, prohibited employees from engaging in solicitation activities without its prior consent, implemented a no-solicitation rule for the purpose of interfering with employees' organizational rights, and prohibited employees from engaging in solicitation in nonpatient care areas. Further, the fact that Blair's questions were not simply confined to King's attitude toward the Union—but addressed other employees' support for the Union as well—adds to the coercive nature of this interrogation.[8]

Contrary to our colleague, we find Blair's questions were neither casual nor nonthreatening. Blair's questions about King's reason for wearing the union button if she was happy with her job and whether King thought the Union could help with mandating of work if there was nobody to put in the job conveyed Blair's disapproval of King's union activities. Further, contrary to our colleague, the fact that King was an open union supporter and that Blair was not a high-level supervisor does not, under all the circumstances discussed above, negate the coercive nature of Blair's interrogation.[9] Finally, we reject our dissenting colleague's contention that King's truthful response negates a finding of coercion. Although an employee's honest reply may support the inference that the interrogation did not inspire fear, the fact that King ceased wearing her union button following Blair's questioning shows otherwise. In sum, contrary to our colleague, we find that the Respondent violated Section 8(a)(1) by coercively interrogating King.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Norton Healthcare, Inc., d/b/a Norton Audubon Hospital, Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2 (a) and reletter the respective subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

MEMBER COWEN, concurring in part and dissenting in part.

Contrary to the majority, I would reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employee Maryann King about her union sympathies and those of other employees. In the remaining respects, I agree with my colleagues' decision, except that my rationale for finding that the Respondent unlawfully failed to employ McCombs in a certified nursing assistant type position is set forth below.

1. I agree with my colleagues that the judge properly found that, between August 11, 1999 and mid-September 2000, the Respondent unlawfully failed to employ Wilma McCombs in a certified nursing assistant type position, such as a patient support associate (PSA) or patient care associate (PCA).[1] In adopting the judge's finding, how-

[5] *Rossmore House*, supra at 1178 fn. 20 (applying factors to open and active union supporters); see also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985) (applying *Rossmore House* standards to questioning of employees who are not open union supporters); *Kellwood Co.*, 299 NLRB 1026 (1990), enfd. mem. 948 F.2d 1297 (11th Cir. 1991).

[6] Contrary to the dissent, we agree with Board precedent that the absence of assurances that the questions did not have to be answered or that reprisals would not take place is a factor tending to establish the existence of coercive circumstances. See, e.g., *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363, 372 (7th Cir. 2001); *Stoody Co.*, 320 NLRB 18, 19 (1995) (questioning of an open union supporter about the employee's union sympathies by a supervisor in the supervisor's office with no proper reason or assurances given concerning the questioning against a background of unfair labor practices was coercive); *C.S. Telecom, Inc.*, 336 NLRB 1193, 1193 (2001).

[7] See *Electrical South, Inc.*, 327 NLRB 270, 276 (1998) (in context of performance evaluation meeting, interrogation of employee whose union sentiments were unknown was coercive).

[8] See *Cumberland Farms*, 307 NLRB 1479 (1992), enfd. 984 F.2d 556 (1st Cir. 1993) ("the fact that the interrogators sought information about other employees and the organizing effort in general" supports a finding that the interrogation was unlawful).

[9] See, e.g., *Stoody Co.*, supra at 19.

[1] In agreement with the majority, I would modify the judge's recommended Order to omit the recommendation that the Respondent offer McCombs a 1.0 PSA position or, if one does not exist, a substantially equivalent position.

ever, I rely only on the reasons stated below as establishing sufficient animus.

Wilma McCombs worked as an environmental service aide at Respondent's facility since 1980. Following the outsourcing of the environmental service department in March of 1999, McCombs sought to secure a full-time (1.0) position within the Norton system in order to retain her seniority. Unable to obtain a 1.0 position during the first couple of months of the displacement, McCombs took advantage of the Respondent's offer to pay for certified nursing assistant training for displaced environmental service employees, and she received a certification from the state in June of 1999. Thereafter, she submitted several applications for open PCA positions. It was not until September 2000, following the reinstatement of the environmental service department employees as Respondent's employees, that McCombs was offered a 1.0 PCA position.

Evidence of the Respondent's discriminatory motivation is found in the facts that (1) there was a consistent need for PCAs during the relevant time period, (2) the Respondent was having a severe problem retaining PCAs, (3) the Respondent had a stated policy giving preference to the outsourced environmental service department employees for open PCA positions, and (4) McCombs was undisputedly qualified for a PCA position. Further, the judge found, and the Respondent does not dispute, that the Respondent informed McCombs that her application for PCA positions would remain on file for 2 years and that it was unnecessary for her to submit further applications for any PCA position. However, McCombs only got two interviews during the relevant time period, neither of which led to an offer.

Moreover, in excepting to the judge's finding that at least eight of the individuals hired for PCA positions were less qualified than McCombs, the Respondent contends that there was no evidence that McCombs applied for the PCA vacancies for which these eight hirees applied. The Respondent's assertion is clearly inconsistent with the fact that it told McCombs that she no longer needed to apply for PCA positions. In this regard, the Respondent's demonstrably false reason for not offering McCombs a PCA position is further evidence of the Respondent's discriminatory motivation.[2] I therefore affirm the judge's finding that the Respondent's refusal to employ McCombs in a PCA position violated Section 8(a)(3) and (1) of the Act.[3]

2. Contrary to my colleagues, I would dismiss the 8(a)(1) allegation involving the alleged interrogation of Maryann King in August 2000.

The relevant facts are these. Maryann King had worked at Respondent's facility since 1999 as a registered nurse (RN). King was an open union advocate, who regularly wore union buttons at work. King was in her supervisor Kim Blair's office in August 2000, for her employee rating. After King received the evaluation, Blair said that she observed that King was wearing a union button, and commented that "I guess that means you're for the Union." King replied, "yes." Blair then asked King if she was unhappy with her job. King answered that she loved her job. Blair subsequently questioned King why she was wearing the button and King responded that there were a lot of issues for nurses. Blair next inquired about the issues King felt the Union could address. King responded, listing two issues, mandating of work and a pension plan. Blair also stated that she had noticed other employees wearing buttons and queried King whether she thought the Union could win an election at that time. According to King, she did not feel threatened or intimidated by the questions.

I agree with my colleagues that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality of the circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Contrary to my colleagues, I find that Blair's inquiry was not coercive under this test.

[2] The Board has held that where a respondent's asserted reason for an action is found to be false, the inference is that the respondent was attempting to conceal an unlawful motive. *Shattuck Denn Mining Corp*., 151 NLRB 1328 (1965), enfd. 362 F.2d 466 (7th Cir. 1966).

[3] With respect to the Respondent's statements opposing the Union, I would not, in any circumstance, rely on such statements as evidence of animus. The statements are protected by Sec. 8(c) of the Act, which provides that if a statement is not a threat or a promise, the statement is not an unfair labor practice and it cannot "be evidence of an unfair labor practice under any provision of this Act." In *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733 (4th Cir. 1998), the Fourth Circuit stated that "Speech protected by [Sec. 8(c)] cannot be used by the General Counsel to establish an employer's anti-union animus." Id. at 744. The Court reasoned that otherwise an employer's lawful antiunion speech would be chilled by the fear the Board could use it to show antiunion motivation. Id., quoting *Alpo Pet Foods v. NLRB*, 126 F.3d 246, 252 (4th Cir. 1997). I agree with the Circuit's conclusion that "This impermissible result would completely undermine § 8(c) by rendering its protection an empty promise." Id. See also *B E & K Construction v. NLRB*, 133 F.3d 1372, 1375–1377 (11th Cir. 1997); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990). Because, as a general matter, I do not consider the unfair labor practices of a respondent's predecessor as evidence of animus, I would not rely on the same here.

Finally, I find it unnecessary to pass on the judge's finding discrediting the testimony of Kim Blair and Tammy McClanahan concerning their respective reasons for not offering McCombs a PCA position.

First, King, was an active union adherent, who openly declared her support by wearing a union button to work.[4]

Second, the evidence shows that Blair's inquiries were brief and casual. Although the setting was formal, the conversation itself contained no expression of displeasure or antagonism toward the Union. There is no evidence that Blair's manner or tone of voice was threatening or hostile. Nor could her questions reasonably be understood as an attempt to obtain information on which to base disciplinary action.[5] Instead, Blair's general questions were nonthreatening in nature and were designed to encourage a dialogue regarding King's concerns.[6] Third, King truthfully responded to Blair's questions, thus indicating that she was not intimidated or threatened by them. Fourth, Blair did not follow up on her questioning.

Fifth, regarding the identity of the questioner here, Blair was a relatively low-level supervisor.[7] Finally, although the questioning occurred in a formal atmosphere, this factor, standing alone does not transform otherwise innocuous questions into an unlawful interrogation.

For all these reasons, I disagree with my colleagues' and the judge's findings that Respondent's questioning of King was coercive.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT advise you that discussions regarding the Union are prohibited during worktime, while other nonwork related discussions are permitted.

WE WILL NOT interrogate you regarding your union sympathies and those of other employees.

WE WILL NOT refuse to employ individuals in patient support associate positions because of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you in Section 7 of the Act.

WE WILL make Wilma McCombs whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, plus interest.

NORTON HEALTHCARE, INC., D/B/A NORTON AUDUBON HOSPITAL

Donald A. Becher, Esq., for the General Counsel.
Kay Tillow, of Louisville, Kentucky, for the Charging Party.

[4] In *Rossmore House*, supra, the Board overruled prior precedent establishing a per se rule concerning the interrogation of open union supporters. Id. at 1177. In doing so, the Board noted that to find that mere casual questioning about union-related matters violated the Act "ignore[d] the realities of the workplace." Id. The Board found that the front-line supervisors' casual and spontaneous questions about an employee's union activities, in direct response to the employee's voluntary self-identification with the union were noncoercive under the totality of the circumstances, including the fact that the employee was an open union supporter. See also *Keystone Lamp Mfg. Corp*., 284 NLRB 626 (1987), enfd. mem. 849 F.2d 601 (3d Cir. 1988), cert. denied 488 U.S. 1041 (1989) (no violation where managers questioned active union supporters, who openly wore union buttons at work, why they were wearing buttons).

[5] *Stoody Co*., 320 NLRB 18, 19 (1995), cited by the majority, is clearly distinguishable. In that case, an employee was questioned by a high-level supervisor immediately following an argument, which led to the employee being disciplined. In contrast, King was questioned by a low-level supervisor following a satisfactory performance evaluation. Additionally, the prior unfair labor practices cited by the majority do not support a finding of coercion, as they are unrelated and for the most part, occurred at a substantially earlier time.

Further, I reject my colleagues' and the judge's reliance on the facts that King was not informed of any legitimate reason for the questioning, and she was not assured that she did not have to answer the questions or that there would be no reprisals against her for her responses, to support a finding of coercive interrogation. While such assurances may diminish the effect of an otherwise coercive interrogation, the absence of assurances does not create a coercive environment that otherwise is absent. Thus, I would not consider lack of assurances as affirmative evidence of a coercive interrogation.

[6] See *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988) (employer's general inquiry to open union supporters regarding what they hoped to gain from the union that was not accompanied by threats or promises found non-coercive).

The majority speculates that Blair's question as to whether " the Union could assist with mandating of work if there was nobody to put in the job" would reasonably lead an employee to believe that Blair disapproved of union activity. To the contrary, I view Blair's comment as a reasonable attempt to highlight the scheduling problems faced by the Respondent. In addition, I disagree with the majority's reliance on Blair's inquiry concerning other employees to further support a finding of coercion. In my view, merely questioning an open union supporter generally about the extent of union support, without probing the views of specific individuals, is not coercive.

[7] See, e.g., Chairman Hurtgen's dissent in *Clinton Electronics Corp*., 332 NLRB 479, 483 (2000) (relying in part on the fact that the questioner was a low-level supervisor in finding that the interrogation was lawful); cf. *C.S. Telecom, Inc*., 336 NLRB 1193, 1193 (2001) (finding coercive interrogation where employee was questioned by high-ranking company official).

Grover C. Potts Jr., Esq., of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon charges filed on February 11, 2000, and September 19, 2000, by Nurses Professional Organization, affiliated with the United Nurses of America, American Federation of State, County and Municipal Employees, AFL–CIO, herein referred to as the Union, against Norton Healthcare, Inc. d/b/a Norton Audubon Hospital, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a Consolidated Complaint dated January 10, 2001, alleging violations by the Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. The Respondent, by its Answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Louisville, Kentucky, on April 4 and 5, 2001, at which the General Counsel and the Respondent were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Therefore, the parties filed briefs which have been daily considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the operation of a hospital in the Louisville, Kentucky area, which provides acute medical care. During the year preceding issuance of the Consolidated Complaint, a representative period, the hospital, in conducting its operations, derived gross revenues in excess of $250,000, and purchased and received, at its Louisville, Kentucky locale, goods valued in excess of $50,000, directly from suppliers located outside the Commonwealth of Kentucky. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

The Nurses Professional Organization (NPO) actively has sought to organize the registered nurses and other employees working at Audubon Hospital since 1989, when the hospital was owned by Humana, Inc., and was known as Humana Audubon. By 1994, following a series of corporate mergers and divestitures, control of Audubon had passed to Columbia/HCA Healthcare Corporation. The hospital was thereafter purchased by the Respondent, under the name Alliant Health System, Inc., on September 1, 1998, and, now, is operated by the Respondent as Norton Audubon Hospital.

In *Audubon Regional Medical Center*,[1] the Board found that, while owned and controlled by Columbia/HCA, during the 1994 to 1996 period, the hospital engaged in numerous and very serious violations of Section 8(a)(1), (3) and (4) of the Act, including discharging and otherwise discriminating against employees because of their union and other protected concerted activities and because of their assistance in Board proceedings; attempting to discourage employees' union support by announcing a wage increase and new and increased benefits; stating that it would not negotiate if the employees selected a union to represent them; threatening employees with plant closure or sale, job and benefit loss and other adverse consequences if the employees selected a union; soliciting employee grievances and promising to adjust them in order to dissuade employees from supporting the Union; discriminatorily enforcing posting rules affecting union campaign literature. The Board, contrary to the administrative law judge, declined to issue a bargaining order in that case solely due to the subsequent change in ownership and management, employee turnover and the passage of time. On June 6, 2000, the Board adopted the decision of Judge Leonard Wagman,[2] finding that, in the 1998 and 1999 period, following the transfer of Audubon to the Respondent, the hospital, and Norton's nearby facility, Norton Hospital, engaged in violations of Section 8(a)(1) of the Act by issuing a written warning to Registered Nurse (RN) Susan Yost for having engaged, on February 23, 1999, in protected concerted activity, namely, searching for an employee to be interviewed by the local newspaper regarding Norton's planned outsourcing of the housekeeping services at its facilities; prohibiting employees from engaging in solicitation activities without its prior approval; promulgating a no-solicitation rule for the purpose of interfering with employees' organizational rights; prohibiting employees from engaging in solicitation in non-patient care areas; prohibiting off-duty employees from engaging in solicitation, or distribution of literature, anywhere on its property.

In the instant case, the General Counsel contends that, between August 11, 1999, and mid-September, 2000, the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ an individual, Wilma McCombs, in a certified nursing assistant type position, such as a patient support associate (PSA) or patient care attendant (PCA), because of her known union activism, and because she engaged in other protected concerted activities. The Respondent argues that it filled open positions of this type utilizing lawful criteria, and that it acted, in that regard, without consideration of McCombs' union sympathies or protected conduct. Also at issue is whether the hospital violated Section 8(a)(1) of the Act by advising an employee that discussions regarding the Union were prohibited during worktime, while other non-work related discussions were permitted, and by interrogating an employee regarding her union sympathies and those of other employees.

[1] 331 NLRB 374 (2000).

[2] *Norton Healthcare, Inc.*, JD–56–00 (2000).

B. Facts[3] and Conclusions

1. Worktime discussions regarding the Union

Martha Ann Hurst, an RN, has been employed at Audubon Hospital since 1981, and works as a staff nurse in the Respondent's cardiovascular unit under the supervision of clinical manager Kim Blair, a statutory supervisor. Hurst, now an NPO vice-president, was, in the summer of 2000, a member of its executive board. She testified that, early in July, 2000, Blair called her into the office and told Hurst that she, Blair, had gotten word that Hurst was "talking about the Union" at the nurses station. Hurst responded, stating that she had not done so and that she knew better than to do that. Hurst said that if someone asked her a brief question, she would give a brief reply and, then, ask the other person to leave. According to Hurst, Blair then stated that it had been called to her attention that Hurst was talking about the Union in the lounge, also, an area not related to patient care. Hurst answered, saying that she had a right to talk about any subject in the lounge. Blair stated that Hurst "could not talk about the Union" during report time.

Report time is a one-half hour period, on the clock, during which the care of patients is divided among the nurses and, in the cardiovascular unit, the incoming shift of nurses reviews the patient cardexes, as updated by the outgoing shift, to learn of patient histories and new situations and needs. The incoming nurses may also ask questions of those who worked the previous shift. Report time, in the cardiovascular unit, generally takes place either at the nurses station, a public area where patients and others may appear, or in the lounge or break room, a private space not accessible to patients and others. There is substantial record evidence establishing that, during this period, and during worktime, generally, employees discuss all sorts of non-work related subjects. Prior to Blair's admonition to Hurst, the hospital had not sought to limit the topics open for discussion.

Blair, in her testimony, stated that she told Hurst that she, Blair, had received complaints from two nurses that they had been approached by Hurst concerning the NPO, during worktime, one at the nurses station and one in the lounge during report time. Those nurses felt that they were being harassed. Blair instructed Hurst that "you can discuss NPO during break, lunch, off hours, parking lot, whatever, but during working hours which is 6:45 in the morning, that is work hours because you're getting report, or in the middle of the nurses station when someone's trying to work, she cannot do it."

As the undisputed record evidence establishes that the Respondent permits its employees to discuss non-work related matters, without limitation, during working time, Blair's instruction to Hurst, to refrain from talking about the Union, and only the Union, during worktime, was discriminatory and unlawful. An employer may not prohibit the discussion of unionization, on worktime, while, without concern, it permits discussion of all other subjects.[4] I find that, by the foregoing conduct, the Respondent, by its supervisor, Blair, violated Section 8(a)(1) of the Act.

2. Interrogation

Maryann King has worked at Norton Audubon since 1999, as an RN, under the supervision of Blair. King openly has supported the Union and has regularly worn NPO insignia at work. She testified that in August, 2000, she was in Blair's office to receive her employee rating, or evaluation. Blair's evaluation of King was satisfactory to the employee and, once completed, the supervisor turned to a different subject. She told King that she, Blair, noticed that King was wearing a union button and that "I guess that that means you're for the Union." When King said, yes, Blair asked if King was unhappy at Audubon. King replied, stating that, in fact, she loved her job. Blair then asked, "[W]ell, what would be the purpose of wearing the union button?" King said that there were a lot of issues for nurses. Blair pressed on, asking King what, in particular, she thought that the Union could help with. King listed mandating of work, as well as a pension plan. Blair then asked King if she thought the Union would be able to help with mandating "if there's nobody to put in the job." King answered that there wasn't anyone trying to remedy the matter and, possibly, the Union could do that. Blair next stated that she noticed that a lot of the employees were wearing buttons and she asked King if the employee thought "that the Union would pass if it were voted on right now." King said that she was not sure. King further testified that, while she did not feel threatened or intimidated by the questioning, she no longer wears union insignia to work, due to the controversy it created. Blair testified about her August, 2000, meeting with King in much less detailed fashion but, nonetheless, essentially confirmed King's version of events.

An employer's questioning of open and active union supporters about their union sentiments, in the absence of threats or promises of benefit, does not necessarily violate Section 8(a)(1) of the Act. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference.[5]

Here, King, an open union supporter, was questioned in her supervisor's office immediately after receiving her employee evaluation. She was not informed of any legitimate purpose for being asked whether, and why, she favored the Union, and about the degree of union support among the employees, generally. Likewise, Blair did not assure King that she need not answer the questions or that reprisals would not be taken against her regardless of her answers. The interrogation occurred following other serious employer unfair labor practice conduct. In these circumstances, I find and conclude that Blair's questioning of King, concerning her union sympathies

[3] The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, infra. In general, I found Wilma McCombs, the alleged discriminatee, a forthright and believable witness in possession of a clear recollection of events, and I have relied upon her testimony.

[4] *Teksid Aluminum Foundry*, 311 NLRB 711, 713 (1993).

[5] *Rossmore House*, 269 NLRB 1176 (1984).

and those of other employees, was coercive, and violative of Section 8(a)(1) of the Act.[6]

3. Wilma McCombs

Wilma McCombs has worked at Audubon Hospital since 1980, through the various changes in ownership. She is employed as an environmental service aide, responsible for cleaning and sanitizing patient rooms, preparing beds for incoming patients and cleaning work areas. McCombs is a member of the NPO executive board, the only union officer who is not a nurse. Through the years, including 1999 and 2000, she has leafleted in support of the Union in the hospital parking lots, distributed union authorization cards and pins to fellow employees and has, on a daily basis, worn union pins and, or, buttons to work. McCombs was, and is, the only environmental service employee to engage in such open support for the Union.

As part of a heightened campaign to obtain recognition as bargaining agent of the Audubon registered nurses from the new owner, Norton, the NPO asked the local government, Jefferson County, in the fall of 1998, to withhold requested financial assistance to Norton until recognition was granted. Thus, the NPO appeared at an October 13, 1998 meeting of the Jefferson County Fiscal Court and argued that the $225 million in low interest, tax-exempt bonds that Norton Health care sought to have the Fiscal Court issue, should not be authorized. Among these who spoke for the NPO at the meeting, which was attended by the Respondent's highest officials, was Wilma McCombs, who argued forcefully against the issuance of the bonds, absent recognition. NPO's activities in this regard, including its statements before the Fiscal Court, and its picketing and other actions, received substantial local television and newspaper coverage. Nonetheless, ultimately, the bond issue was approved.

The Respondent expressed Audubon's continued hostility toward the NPO in its written statements to employees and in its internal communications. Thus, by letter to employees dated January 26, 1999, signed by its president and chief executive officer, and its other top management people, Norton stated:

> The NPO is also the same union that attempted to keep Norton Healthcare from being eligible for tax-exempt financing for the hospitals' acquisition bond issue. If the NPO had been successful, it could have increased costs up to $2,000 a day for years. The clear result would have been less money for employee wages and benefits, supplies and equipment as well as higher costs to patients. How could NPO's actions in this regard have been in the best interests of nurses or patients?

By newsletter of April 28, 1999, again signed by Norton's president, the employees were told:

> [T]he NPO will not add value to our organization. We believe a union will cause higher operational costs, less flexibility, rigid work rules and even the risk of job actions or strikes. We believe a union's presence here will have a very serious impact on you and Norton Healthcare.

In its internal documents, following acquisition, Norton noted:

> In spite of the turnover among RNs since the 1994 election, there remains a solid core of union supporters throughout nursing services with concentrated support in the critical care units, open heart unit, surgical services and 3 East.
>
> There is a significant number of RNs whose sentiments are unknown either because they are new to the facility, new to the unit, or have a new manager.
>
> There are a few LPNs who are identified as union supporters, however, their scope of influence is limited. At this time, there is no evidence activity has spread to any other technical classifications.
>
> *The managers perceive the PSAs* and unit clerks *to be vulnerable to the union message* because of salaries and workload. Active supporters were identified in maternal/child services and 3 East. However, there is no evidence at this time of an organized effort among nonprofessional employees. [Emphasis supplied.]

On February 23, 1999, at meetings with employees and by internal hospital newsletter, the Respondent announced the outsourcing of its environmental services or housekeeping departments with the functions thereafter to be performed by Crothall Healthcare, Inc. It was further announced that Norton's environmental service department employees would become Crothall employees, as of March 21 of that year. Those housekeeping employees, including McCombs, were assured, however, that, if they wished to remain Norton employees, they would be given preference for open positions for which they qualified, at Audubon Hospital and in the Norton hospital system, and would thereby be able to retain their Norton seniority.

When Kay Tillow, the Union's director of organization, learned of the outsourcing, she asked Susan Yost, a registered nurse at the nearby downtown facility, Norton Hospital, to find out more details and to locate someone to be interviewed by the local Louisville, Kentucky, newspaper, the Courier-Journal, about the matter. Two days later, on February 25, Yost received a written warning for her activities in this regard, a discipline, as noted, found unlawful by Judge Wagman whose decision was, thereafter, adopted by the Board. A day before, on February 24, the Courier-Journal published an article about Norton's decision to outsource the housekeeping operations which included an interview with Wilma McCombs and described her predicament as a longtime employee who stood to lose her seniority and suffer a reduction in pay and benefits.

McCombs and the other displaced Audubon environmental service department people were instructed by the Respondent to deal with human resource department employee Delores White in seeking to fill open positions at Norton. McCombs repeatedly told White that she, McCombs, wanted any position that she was qualified for, so long as it was a full-time position (in Norton parlance, a 1.0 position). Thereafter, McCombs, who would learn of job openings through the job postings in human resources, began submitting applications and requests for transfer within the Norton system. When she did so, White would advise her that her application would remain on file for 2 years, and that the employee need not submit further applications.

[6] *Multi-Ad Services*, 331 NLRB 1226 (2000).

After becoming a Crothall employee, and, unable to secure a position which would return her to the Norton system, McCombs took advantage of Norton's offer to pay for certified nursing assistant training for displaced environmental service employees. She received a certification from the State of Kentucky in June, 1999. In McCombs' personnel file at Norton appears the evaluation of her instructor, noting that she was a "conscientious student, worked hard & mastered course material easily." Following certification, beginning July 19, 1999, McCombs, working from the Norton job postings, submitted numerous applications for open certified nursing assistant positions (as noted, dubbed patient care attendant and, or, patient support associate positions). Again, she was told that the applications stayed on file for 2 years. Through electronic mail to White and others at Audubon, McCombs continually asserted her desire for a Norton job, nursing or non-nursing, as long as it was full-time. She received no offers. On January 31, 2000, McCombs, by electronic mail, asked White to explain why her e-mail communications concerning job opportunities go unanswered while full-time nursing assistant positions in the hospital are filled by individuals having no experience, no certification, no seniority and who are not students. In this regard, McCombs specified individuals by name. She received no response.

McCombs enjoyed a spotless work performance record while employed by Norton. Yet, she was not offered an aide position despite the Respondent's continued, often heavy, need for full-time aides during the August 1999, to September, 2000, period as reflected in the job postings, numerous newspaper advertisements run by Norton, internal correspondence and the running of a job fair in February, 2000. It is undisputed that, throughout the relevant time-frame, Audubon experienced a very severe retention problem with the certified nursing assistants it hired.

On two occasions, McCombs was able to secure an interview relating to an open aide position. Thus, on September 23, 1999, clinical manager Kim Blair chose to interview McCombs for a 32-hour per week aide position (a .8 position) despite McCombs' repeated expressions of her need for a full time (1.0) job, only, and the availability of such positions. Blair did not offer the aide position to McCombs because, Blair testified, McCombs "did not interview well," seemed disinterested, evaded answering questions and was seeking to protect her salary, established by Norton, against diminution by Crothall. Later, on October 6, 1999, McCombs was interviewed for an aide position by statutory supervisor Tammy McClanahan. According to McClanahan's testimony, McCombs stated at the interview that she wanted to become a nursing assistant in order to avoid losing her Norton benefits and Norton seniority. McClanahan decided, she testified, not to offer a job to McCombs because she, McClanahan, wanted someone who had a love of patient care and not someone who just wanted to maintain benefits and seniority.

It is curious that, despite its critical problem with respect to the retention of aides, both Blair and McClanahan claimed to hold against McCombs her desire to protect her seniority, salary and benefits by returning to the Norton system, where she clearly intended to stay. In any event, neither of those supervisors impressed me as entirely truthful witnesses and their respective testimony in this regard is not credited.

In June, 2000, Norton terminated its relationship with Crothall and the environmental service department, with its 60 employees, including McCombs, was reinstated as a Norton department. By this process, McCombs returned as a Norton employee. Only after her return, in September, 2000, was she, for the first time, offered a 1.0 aide position, indeed, after an interview conducted by Blair. McCombs accepted the offer but, later, changed her mind and declined it.

In addition to those transferred within the Norton system to fill open full-time aide jobs during the period August 11, 1999, to June 19, 2000, some 23 individuals were newly hired in that time-frame into 1.0 patient support associate jobs at Audubon Hospital. This, at a time when the Respondent had committed itself to giving preference to qualified displaced environmental service people. At the least, eight of the new hires, demonstrably, had lesser qualifications than McCombs. Thus, Kelly Bohannon, hired on August 15, 1999, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority, albeit, she had worked at Audubon for a period of 1 month, in orientation, some years before; Shelia Buehner, hired on June 18, 2000, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority; Mary Jo Crosley, hired on February 27, 2000, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority; Sabrina Green, hired October 24, 1999, lacked nursing assistant certification and Norton seniority; John Harper, hired February 13, 2000, a heating, ventilating and air-conditioning mechanic, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority; Rebecca Heschke, hired February 1, 2000, whose experience was as a salesclerk and cashier, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority (in 1998, Heschke very briefly attended nursing school, but dropped out); Jennifer Pugh, hired April 16, 2000, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority; Temeka Wilkerson, hired April 9, 2000, lacked nursing assistant certification or experience, hospital experience generally, and Norton seniority (indeed, Wilkerson was a Crothall employee, a housekeeper, not previously employed at Norton).

As shown, during the relevant period, the Respondent was hiring 1.0 patient support associates and the applicant, Wilma McCombs, very successfully had completed training covering the requirements of the position. McCombs was a highly motivated union activist in the forefront of NPO's campaign for recognition, and the Respondent knew it. As rendered clear in this and earlier cases, the hospital harbored a high degree of antiunion animus and has demonstrated a willingness to oppose the NPO by unlawful means. In these circumstances, the inference amply is warranted that Norton denied employment as a patient support associate to McCombs for discriminatory reasons.

In the face of the General Counsel's very strong prima facie case of unlawful refusal to employ McCombs in the position in question, the Respondent has not shown, by credible record

evidence, that it would have denied employment as a nursing aide to McCombs, even absent her protected conduct. Thus, Norton has not demonstrated that McCombs lacked the qualifications required to fill the open positions, or that those who were hired had superior qualifications. Rather, the record evidence shows that, at a time when Audubon Hospital was committed to granting preference to qualified displaced environmental service aides, it chose to hire from outside the Norton system, into 1.0 nursing aide jobs, at least 8 individuals with clearly lesser qualifications, in some cases, without any discernable qualifications. In this regard, I note the portions of the Respondent's internal communications, set forth, above, showing its concern that those in nursing aide jobs were "vulnerable to the union message." Indeed, once the outsourcing relationship with Crothall had ended, and the environmental service employees, including McCombs, had been returned to the Norton payroll, so that McCombs was, in any event, back as a Norton employee and able to spread the NPO message, then, and not before then, the Respondent offered to McCombs one of its many open full-time patient support associate jobs.

Under the test to be utilized in discriminatory refusal to hire cases, as enunciated by the Board,[7] the record evidence in this case compels the conclusion that, between mid-August, 1999, and mid-September, 2000, the Respondent refused to hire McCombs into a full-time patient support associate position because of her union and other protected concerted activities. The Respondent thereby violated Section 8(a)(3) and (1) of the Act.[8]

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Norton Healthcare, Inc. d/b/a Norton Audubon Hospital is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. Nurses Professional Organization, affiliated with the United Nurses of America, American Federation of State, County and Municipal Employees, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By advising an employee that discussions regarding the Union were prohibited during worktime, while other non-work related discussions were permitted, and by interrogating an employee regarding her union sympathies and those of other employees, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. By failing and refusing, between August 11, 1999 and mid-September, 2000, to employ Wilma McCombs as a patient support associate, because of her activities on behalf of the Union and because of her other protected concerted activities, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[9]

ORDER

The Respondent, Norton Healthcare, Inc. d/b/a Norton Audubon Hospital, Louisville, Kentucky, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Advising employees that discussions regarding the Union are prohibited during worktime, while other non-work related discussions are permitted, and interrogating employees regarding their union sympathies and those of other employees.

(b) Refusing to employ individuals in patient support associate positions because of their union activities or other protected concerted activities.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Wilma McCombs a full-time (1.0) patient support associate position or, if that position no longer exists, a substantially equivalent position, without prejudice to her seniority or any other rights or privileges.

(b) Make Wilma McCombs whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[7] See *FES*, 331 NLRB 9 (2000).

[8] See also *Glenn's Trucking Co.*, 332 NLRB 880 (2000).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its facilities in Louisville, Kentucky, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 11, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."